

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
3 - - - - -
4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,
10 Plaintiffs,
11 vs. File No. C1-94-8565
12 Philip Morris Incorporated, R.J.
13 Reynolds Tobacco Company, Brown
14 & Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,
20 Defendants.
21 - - - - -
22 TRANSCRIPT OF PROCEEDINGS
23 VOLUME 69, PAGES 13795 - 13912
24 APRIL 24, 1998
25

1 P R O C E E D I N G S.
2 THE CLERK: All rise. Ramsey County
3 District Court is again in session, the Honorable
4 Kenneth J. Fitzpatrick now presiding.
5 (Jury enters the courtroom.)
6 THE CLERK: Please be seated.
7 THE COURT: Good morning.
8 (Collective "Good morning.")
9 THE COURT: Counsel.
10 MR. GILL: Thank you, Your Honor.
11 Good morning, ladies and gentlemen.
12 (Collective "Good morning.")
13 JAMES J. MORGAN
14 called as a witness, being previously
15 sworn, was examined and testified as
16 follows:
17 CROSS-EXAMINATION (cont'd)
18 BY MR. GILL:
19 Q. Good morning, Mr. Morgan.
20 Q. Good morning, Mr. Gill.
21 Oops. Is this on?
22 Q. Sounds like it.
23 A. Can you hear me?
24 Q. By the end of the 1970s, you had risen to the
25 position of executive vice-president of marketing and
CROSS-EXAMINATION - JAMES J. MORGAN

1 sales; correct?
2 A. Yes.
3 Q. In that position you were reporting directly to
4 the president of the domestic tobacco company?
5 A. Yes, I was.
6 Q. And by the end of the 1970s, Marlboro had become
7 the top ranked in terms of share of market in the

8 cigarette industry; true?
9 A. I believe so.
10 Q. Marlboro had become the franchise of the
11 company.
12 A. It had become the biggest brand in the company,
13 yes.
14 Q. And executives in the company considered
15 Marlboro to be the franchise of the company by the
16 late 1970s; did they not? That would be fair?
17 A. Yes.
18 Q. You had helped make Marlboro the franchise of
19 the company, given your work in marketing throughout
20 the 1970s, and especially with respect to the
21 Marlboro brand.
22 A. I think that's a fair comment.
23 Q. And its success led, in part, to your rise
24 through the hierarchy of the company; is that a fair
25 statement?

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1 A. I suppose so.
2 Q. Would you look at Exhibit 11808, please. This
3 document is --
4 A. I'm sorry, the book was upside down. I'm just
5 getting organized. 11808?
6 Q. That is correct.
7 A. Okay.
8 Q. This document was written on March 29, 1979;
9 correct?
10 A. Yes, it was.
11 Q. That same timeframe, late '70s, that we just
12 spoke about. It's on the stationery of Philip Morris
13 U.S.A. at its New York headquarters; correct?
14 A. Yes, it is.
15 Q. The first sentence of this document indicates,
16 "Marlboro represents 60 percent of Philip Morris USA
17 sales. The brand accounts for 1/3 of all growth of
18 Philip Morris USA. In 1978 101 billion units were
19 sold. The brand represents 17 percent of the
20 national share of cigarettes."
21 So Marlboro now had a 17 percent share of market
22 at the end of the '70s; correct?
23 A. That is correct.
24 Q. And that would be contrasted with the slightly
25 less than 10 percent of the share of market that Mr.

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1 Cullman was aware of in 1970. Do you recall that
2 document?
3 A. Yes, I do. Uh-huh.
4 Q. This was phenomenal growth in terms of the
5 history of the cigarette industry; was it not?
6 A. I don't know if it was phenomenal. I think some
7 other brands maybe grew as fast, maybe not for as
8 long. But certainly dramatic growth.
9 Q. First paragraph goes on to state, "Marlboro is
10 the volume growth leader in the industry with 4.1
11 billion unit increase (1979) in sales -- (1978) in
12 sales. Marlboro has been a volume growth leader in
13 seven out of the last nine years. It was the first
14 brand to pass one billion units sold."
15 Growth refers to the number of units sold; does
16 it not?

17 A. Growth would refer to the increase in the number
18 of units sold.
19 Q. And that would translate into growth in share of
20 market.
21 A. Unless the industry were growing faster, in
22 which case that wouldn't be the case.
23 Q. But we know that as opposed to growing faster,
24 the industry was, if anything, diminishing in size.
25 A. Right.

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1 Q. And these particular nine years of the '70s, in
2 which Marlboro was the growth leader in seven out of
3 those nine years, were years in which you had a very
4 direct input with respect to the marketing strategy
5 for Marlboro; true?
6 A. True.
7 Q. Let's drop down to the heading "Demographics."
8 Do you see that, the third paragraph?
9 A. Yes, I do.
10 Q. "Marlboro dominates in the 17 and younger age
11 category, capturing over 50 percent of this market."
12 Do you recall yesterday one of the first
13 documents that we spoke about was Mr. Johnston's
14 document in which a graph appeared that related to
15 Marlboro's share of market for the first quarter of
16 '68?
17 A. I -- I remember. It was '68.
18 Q. We talked at length yesterday about that curve
19 that Mr. Johnston had in the graph and whether his
20 speculation that it was going to move to the right
21 would in fact occur.
22 A. I remember that, yes.
23 Q. And what we were talking about yesterday was
24 that among 15- and 16-year-old boys and girls back in
25 the first quarter of '68, Marlboro had approximately

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1 a 20 percent share of that age group. Do you recall
2 that?
3 A. In that particular piece of data it did, yes.
4 Q. And now, little more than 10 years later, the
5 author of this report or presentation is reporting
6 that in the 17-and-younger age category, Marlboro has
7 now captured 50 percent. That is phenomenal growth;
8 is it not, to go from 20 share of market to 50 share
9 of market?
10 A. That would be very significant growth. I don't
11 know where the 50 percent number came from; I assume
12 it came from public government sources.
13 Q. Well wherever it came from, you're certainly not
14 disputing the reliability of the number; are you?
15 A. Oh, I probably could be. What I'm saying is --
16 You know, you say 20 to 50. I don't know if 20
17 was right, I don't know if 50 was right. But I say
18 this: If 20 is off by some, 50 is off by some, I
19 would still accept your conclusion.
20 Q. And Philip Morris employees working at the main
21 headquarters in New York didn't usually pick numbers
22 out of thin air without any foundation and throw them
23 into documents that were going to be circulated to
24 management.
25 A. Of course not.

1 Q. So whereas you said that Marlboro's overall
2 increase from slightly less than 10 percent share of
3 market to 17 percent over that period was a very
4 dramatic increase in share of market, here in this
5 age category, 17 and younger, we are looking at an
6 increase in share of market that absolutely dwarfs
7 the achievement of the brand as a whole across all
8 age groups; true?
9 A. Dwarfs?
10 Q. Well --
11 A. It's -- it's larger.
12 Q. It's considerably larger; is it not?
13 A. Well one's, what, 70 percent increase, 10 to 17.
14 Q. The other is 250 percent.
15 A. Twenty to 50, if you accept 20 to 50 --
16 If you want to call it dwarfs, I'll say it
17 dwarfs.
18 Q. Now with respect to the report of the increase
19 to 50 percent share of market, the author doesn't
20 report anything about the significance of that
21 achievement or that data with respect to plant
22 construction; true?
23 A. Well there's some question about who the author
24 is. I can't figure out who the author is of this
25 document. It's clearly not the -- the brand managers

1 in the last page. I -- I don't know what this
2 document is, to tell you the truth.
3 Q. The question, Mr. Morgan, was what the author
4 reported. And you recall that --
5 A. There's no -- there's no mention of plant
6 management, plant construction.
7 Q. And that was the explanation you offered
8 yesterday as to why Marlboro -- as to why Philip
9 Morris might be tracking young Marlboro smokers.
10 A. I said industry forecasting leading to capacity
11 questions.
12 Q. Now there's a comparison that can be drawn if we
13 look at the next sentence under "Demographics." "In
14 the 18-to-24 age group Marlboro dominates with 30.7
15 share." Do you see that?
16 A. Yes, I do.
17 Q. And you have repeatedly testified during the
18 last two days that the focus and the sole focus of
19 Marlboro marketing with respect to younger adults was
20 upon the 18- to 24-year-old age group; true?
21 A. That is both true that I've testified to that
22 it, and true that it's true.
23 Q. And I take it that when Marlboro became the
24 share leader in the U.S. cigarette industry, that was
25 a cause for considerable celebration among the

1 management of Philip Morris U.S.A.
2 Q. Some people wanted to celebrate. I said we
3 wouldn't celebrate, that just being number one
4 doesn't mean anything. Growing is what means
5 something.
6 Q. Don't even stop to celebrate, just keep growing
7 and lengthening the distance.

8 A. Becoming better at what we do, yes.
9 Q. Well did the company as a whole, the domestic
10 tobacco company, did it acknowledge this achievement
11 in my fashion that you can recall during the '70s
12 when this happened?
13 A. Well here's what I recall: I recall a group of
14 people wanting to run an ad that Marlboro had become
15 the largest-selling cigarette in the United States.
16 I said no. People don't smoke cigarettes because
17 they're the number-one cigarette, it's -- they smoke
18 them because they like them, and being number one
19 doesn't have anything to do with it.
20 I think it was acknowledged in an annual report.
21 I don't think -- as I remember, we did not run any
22 kind of communication to consumers that Marlboro was
23 the number-one brand.
24 Q. But when you had joined Philip Morris in 1963,
25 it was a relatively small company in terms of the

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1 cigarette industry.
2 A. Yeah, it sure was.
3 Q. And in the course of about 12 or 13 years, that
4 relatively small company, on the basis of the success
5 of the Marlboro brand, had gone up to the top of the
6 industry, a place your company had never ever held
7 before; true?
8 A. I only say --
9 Yes. I add to that that it wasn't Marlboro
10 alone. I mean we created a Virginia Slims brand, a
11 Benson & Hedges brand and a Merit brand, all of which
12 have been successful. So I've maintained the
13 position that when you look at Philip Morris's
14 success, you certainly have to look at Marlboro, but
15 you can never ignore that three major brands were
16 created during that -- successfully created during
17 that time period.
18 Q. Without ignoring those other brands, we just
19 agreed a couple of minutes ago that the company
20 regarded Marlboro as the franchise.
21 A. Yes.
22 Q. Did the company throw a party for the employees
23 when it became aware that it was now the number one
24 cigarette brand in the country?
25 A. I don't believe so.

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1 Q. Well how about in everyone's envelope at the end
2 of the year, was there any expression of gratitude
3 from the shareholders for this achievement by way of
4 a bonus?
5 A. I don't know. I -- I don't believe there were
6 bonus programs back then.
7 Q. Didn't have those then?
8 A. It -- it may have been --
9 We're talking 1979. Yes, there was a bonus
10 program, and I'm sure I received a bonus then, yeah.
11 Q. So there was some monetary recognition of this
12 achievement.
13 A. Of being --
14 Of making Marlboro number one?
15 Q. Yes.
16 A. No, I -- I'd say not. I'd say the -- the -- the

17 bonus was again based on things we talked about
18 yesterday, which was market-share growth, volume
19 growth, profitability. I -- I -- I -- I would be
20 very comfortable saying that making Marlboro number
21 one, having it become number one, would not have had
22 any consideration at all in the calculation of a --
23 of bonus.

24 Q. But the two things making Marlboro number one
25 and growth in share of market and profitability were

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1 directly intertwined; were they not?

2 A. I -- I -- I can't say that because of the other
3 brands. I mean you can -- you can make the brands --
4 have a brand become number one in the industry and
5 the company's volume can go down, depending on what's
6 happening to the other brands.

7 Q. And what the author is reporting in the two
8 sentences of the first paragraph under "Demographics"
9 that we've just been looking at is that Philip
10 Morris's marketing department was aggressively
11 marketing to the 18- to 24-year-old age group;
12 correct?

13 A. Yes, I have said that.

14 Q. And it appeared to have been very successful, if
15 you compare the 30.7 percent penetration of that age
16 group to the 17 percent overall market share of the
17 brand.

18 A. That is correct. The share was almost twice as
19 high.

20 Q. But when you look at the 17-and-under age
21 category where you contend no effort was being
22 expended, it appeared -- it appears that there the
23 market penetration had reached 50 percent; true?

24 A. That is what the data says.

25 Q. So what we have here, based upon your testimony,

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1 is that the efforts of Philip Morris marketing
2 produced a dramatic increase in the 18-to-24 age
3 category over the national market share, but that it
4 deserved absolutely no credit at all for even far
5 more substantial penetration of the 17-and-younger
6 age category; is that what you're saying?

7 A. That is not what I'm saying.

8 Q. So your marketing efforts did warrant
9 recognition with respect to achieving a growth in the
10 17-and-under age category from 20 percent in the
11 first quarter of '68 to 50 percent in '79?

12 A. I'm not sure what you mean by our marketing
13 efforts warranted recognition. What I will say is
14 that we marketed to smokers 18 to 24. We had a whole
15 series of programs that were established to be
16 careful not to market below. I am testifying, I've
17 said it probably -- I don't know how many times, we
18 did not market to people below 18. We did not do it.
19 You -- you --

20 If you're asking me to say that the marketing
21 efforts that we did 18 to 24, 24 to 35, 35 to 44,
22 which was all the same marketing effort, if you're
23 asking me to say that that did not be seen by people
24 under 18, I will not say that. It was seen by people
25 under 18. If you're asking me to swear that it did

1 not influence some people under 18, I will not do
2 that because I don't know that. I -- I -- I -- I
3 don't believe -- I --
4 I cannot say that it influenced no one. But I
5 will say this: We did not target. We had programs
6 to prevent ourselves from -- from going out and
7 marketing to those people. I said yesterday it was
8 an uncalculated consequence. There are no documents
9 that show we looked at that group in terms of
10 marketing planning or strategy. It was not part of
11 the equation that I came to work to do.
12 Q. This uncalculated consequence kept repeating
13 itself year in and year out during the '70s; didn't
14 it?
15 A. And the share growth in the 18-to-24 group kept
16 going up and up and up.
17 Q. Mr. Morgan, the question deals with the
18 uncalculated consequence that you mentioned yesterday
19 and again this morning. The uncalculated
20 consequence, as you have now put it, with respect to
21 the 17-and-under age category apparently occurred
22 year after year after year throughout the entire
23 decade of the '70s; didn't it?
24 A. I -- I don't know year after year after year,
25 but I -- I said I -- I look at these numbers and I

1 say if it went from 20 to 50, it certainly went up.
2 Q. And it not only kept occurring repeatedly, it
3 kept growing in magnitude --
4 A. I said --
5 Q. -- as an uncalculated consequence.
6 A. -- as -- as the 18-to-24 group grew.
7 Q. And you say this was occurring while Philip
8 Morris was diligently engaging in programs attempting
9 to curb the prevalence of smoking among boys and
10 girls under age 18.
11 A. I did not say that, sir.
12 Q. Was anybody at Philip Morris attempting to curb
13 the rise of teen smoking throughout the '70s?
14 A. Yes, I believe so. I think that the Cigarette
15 Advertising Code reflected that. I think that the
16 fact that Philip Morris --
17 Q. Now was anybody at Philip Morris, at Philip
18 Morris U.S.A., did anybody have job responsibility to
19 put into action programs that would curb the
20 prevalence of teen smoking and especially teen
21 smoking of Marlboro?
22 A. Well in our day-to-day business practices we had
23 people to make sure that we adhere to the operating
24 processes we were using, so I'd say yes. If your
25 question is was there a person called vice-president

1 of preventing teen smoking, the answer is no.
2 Q. Those people apparently weren't doing a very
3 good job; were they?
4 A. I don't know how you draw that conclusion.
5 Teen-age smoking was going down during the 1970s. It
6 was going down in the 1970s and 1980s, and was going
7 down consistently until 1993.

8 Q. And not going down with respect to Marlboro.
9 A. That's something I couldn't do anything about.
10 Q. Couldn't do a thing about it.
11 A. It -- unless you want --
12 Unless you would expect me to stop using the
13 marketing programs I was using to 18- to
14 24-year-olds.
15 Q. We discussed a number of measures yesterday that
16 could have been undertaken with retailers to curb
17 this prevalence of teen smoking. Do you recall that?
18 A. No, I don't.
19 Q. You don't recall our discussion about what could
20 be done at retail outlets --
21 A. Oh, where you -- where you suggested we run
22 sting operations?
23 Q. -- retail outlets, finding out by sending in a
24 check for ten dollars to a county to run a sample of
25 retailers convicted of selling to minors?

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1 A. I -- I think I'd say two things on that. We
2 debated that point yesterday. But you also have to
3 remember at this point in time in a substantial
4 number of states, the legal age by the states for
5 smoking was either 16 or undefined.
6 MR. GILL: Your Honor, move to strike that
7 as non-responsive, and there's no foundation.
8 THE COURT: It is non-responsive and there
9 is no foundation.
10 BY MR. GILL:
11 Q. Let's look at what the author says about
12 advertising on this page.
13 A. Okay.
14 Q. Exhibit 11808. "When Lights were first
15 introduced, it was a management decision that the
16 advertisement should be significantly different from
17 Red advertising."
18 You told us about that during your direct
19 examination.
20 A. Yes, I did.
21 Q. "The problem was, however, that the money spent
22 on Lights advertising was not reinforcing the
23 franchise."

24 You also told us that one of the hallmarks of
25 Marlboro's success in marketing was it spent its

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1 money where it was strongest; correct?
2 A. Yes.
3 Q. The next sentence reads, "A decision was made to
4 integrate Lights into Marlboro Country and that all
5 advertising dollars spent would reinforce the
6 franchise. We now have a single minded advertising
7 campaign which is a source of growth for the brand,
8 and successfully conveys flavor and quality at the
9 same time." Did I read that correctly?
10 A. Yes, you did read that correctly.
11 Q. The author makes references on two occasions to
12 reinforcing the franchise; correct?
13 A. That is correct.
14 Q. As being pivotal to the growth of the Marlboro
15 brand.
16 A. Correct.

17 Q. And the franchise is another way of saying brand
18 equity; is it not?
19 A. No.
20 Q. Brand equity is the value of the franchise.
21 A. I -- I don't --
22 I don't read the word "franchise" that way at
23 all.
24 Q. When the author is talking about advertising
25 here, and that the campaign for Lights has been

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1 integrated with the campaign for Red and it is now
2 single-minded, the money's being spent where the
3 business is and growth will follow, the author is
4 talking about the growth that he discussed in the
5 demographics section of this document; isn't he?
6 A. No.
7 Q. The author doesn't call out, as you have
8 attempted to do repeatedly in this courtroom, that
9 the focus of the advertising of the single-minded
10 campaign of the attempt to grow relates to the 18 to
11 24 category exclusive of the 17 and younger category;
12 true?
13 A. That -- that's not what the word "franchise"
14 means. It means --
15 Q. That wasn't my question, Mr. Morgan.
16 A. No, not true.
17 Q. Pardon?
18 A. I don't believe --
19 Would you reread the question, please?
20 Q. Can you point me to any place in the paragraph
21 that we just read about the advertising that relates
22 to the demographics from the previous paragraph in
23 which the author indicates that what he's talking
24 about in advertising doesn't apply to all of the
25 demographic groups that Marlboro is selling to?

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1 A. I'm sorry, I -- that's a long question. Would
2 you reread the question? I think I know what to say.
3 It's a "yes" or "no" answer, and I don't want to give
4 the wrong answer.
5 Q. Can you point me to any place in the paragraph
6 we just read about the advertising that relates to
7 the demographics from the previous paragraph in which
8 the author indicates that what he's talking about in
9 advertising doesn't apply to all of the demographic
10 groups that Marlboro is selling to?
11 A. I'm sorry. Can we break that question down? I
12 mean I -- there -- there are like five parts to it.
13 I mean I'm --
14 I'd like to answer, --
15 Q. All right.
16 A. -- but I just -- I can't sort out what the net
17 of the question is.
18 Q. Let me see if I can help you.
19 A. Okay.
20 Q. The author at the very beginning of this page
21 talked about the phenomenal growth of the Marlboro
22 brand; true?
23 A. True.
24 Q. In the '70s.
25 A. True.

1 Q. Then the author got into the demographics with
2 respect to the brand; true?
3 A. Some demographics, true.
4 Q. Yes, just some. The author focused on the
5 demographics that were strongest with respect to the
6 17 percent share of market nationally; true?
7 A. That's true.
8 Q. And after the author discussed those
9 demographics, the author went on to discuss
10 advertising.
11 A. True.
12 Q. And the author talked about how the advertising
13 for Marlboro Lights has been integrated with the
14 advertising for Red.
15 A. That is correct.
16 Q. And the problem with the original advertising
17 for Lights was that it was not reinforcing the
18 franchise.
19 A. That is what this author says.
20 Q. And the author doesn't cull out any particular
21 part of the franchise, just refers to "the
22 franchise."
23 A. That is correct.
24 Q. And then the author says that now that the
25 integration has occurred, all of the advertising for

1 the brand will reinforce the franchise; correct?
2 A. Yes.
3 Q. And that we now have a single-minded advertising
4 campaign which is a source of growth.
5 A. I -- I accept that word is "growth." I can't
6 read it. But okay.
7 Q. And nowhere does the author indicate
8 parenthetically or otherwise that the growth the
9 author is referencing and the reinforcement of the
10 franchise that the author is referencing should not
11 include the 17-and-under age category; true?
12 A. "Should not include." That is true.
13 Q. And as you stated a number of times, it would
14 have been very wrong for Philip Morris to target the
15 17-and-under age category for Marlboro.